

***United States Court of Appeals
for the Second Circuit***

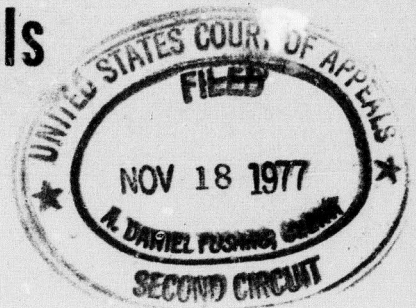


**BRIEF FOR
APPELLANT**

No. 77-6172

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6172



AMERICAN CYLINDER MANUFACTURERS COMMITTEE, *Plaintiff-Appellant*,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of
Transportation, JOHN J. FEARNSIDES, as Acting Director,
Materials Transportation Bureau, ALAN I. ROBERTS, as Acting
Director, Office of Hazardous Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD., *Defendants-Appellees*.

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BRIEF FOR APPELLANT

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November 18, 1977



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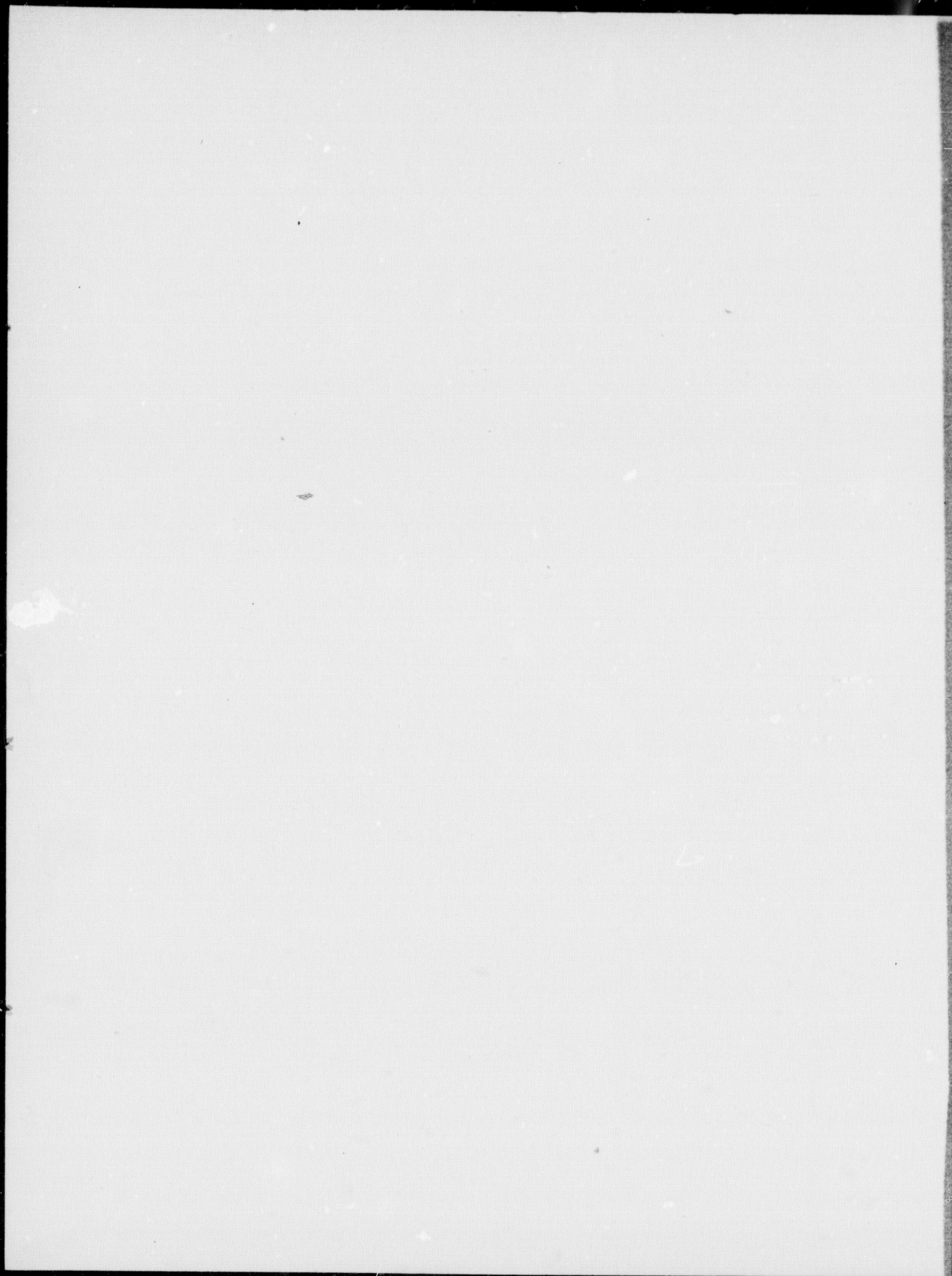
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DEPARTMENT OF TRANSPORTATION, BROCK ADAMS,
as Secretary of Transportation, JOHN J. FEARNSIDES,
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ALAN I. ROBERTS, as Acting Director, Office of
Hazardous Materials Operations, and ENGINEERING
PRODUCTS OF CANADA, LTD.,

Defendants-Appellees.

BRIEF FOR APPELLANT

Preliminary Statement

This is an action to determine whether the Department of Transportation, ("DOT") can issue certain "approvals" (licenses with certain special conditions) to inspect or test compressed gas cylinders in a foreign country without first providing public notice of its action, and the opportunity for public comment, or the opportunity for a public hearing if comments raise disputed issues of fact.

The relevant facts are not in dispute. This case raises legal issues of first impression about the application of a new procedural enforcement scheme adopted by DOT to its established cylinder manufacturing and testing regulations under the Hazardous Materials Transportation Act ("HMTA").

The problem of statutory interpretation raised by this case will not, we believe, be easy to resolve: there is no section in the HMTA which expressly authorizes the issuance of any kind of license, so the ordinarily simple matter of determining the controlling section of the controlling statute will not be simple here. Only two possibly-applicable provisions were discussed in the court below: 49 U.S.C. §§1804(a) and 1808(a). Both require public procedures which DOT ignored when it issued the licenses which are the subject of this dispute.

ISSUES PRESENTED

This appeal presents the following issues for review:

1. Must the Department of Transportation provide public notice and the opportunity for a hearing as required by the Hazardous Materials Transportation Act, 49 U.S.C. §1808(a) before it issues "approvals" pursuant to 49 C.F.R. §173.300 a and b ?

2. If §1808(a) does not apply, does §1804 of 49 U.S.C. empower the Department of Transportation to issue the foregoing approvals after public notice and the opportunity for public comment?

3. Does the American Cylinder Manufacturers Committee have standing to bring this action?

STATEMENT OF THE CASE

THE PARTIES

Plaintiff, the American Cylinder Manufacturers Committee ("ACMC"), is an unincorporated association of domestic cylinder manufacturers whose members produce approximately 90 percent of all domestically manufactured compressed gas cylinders.^{1/}

The Department of Transportation ("DOT") is an executive department of the United States. Brock Adams is the Secretary of Transportation; he is charged with the responsibility of promulgating regulations for the safe transportation of hazardous materials under §105 of the Hazardous Materials Transportation Act, 49 U.S.C. §1804. Defendant John J. Fearnside is Acting Director of the Materials Transportation Bureau ("MTB"), to which the Secretary of Transportation has delegated authority to promulgate such regulations. Defendant Alan I. Roberts is Acting Director, Office of Hazardous Materials Operations ("OHMO") which considers applications for the licenses which are the subject of this dispute.

Engineering Products of Canada, Ltd., 150 Industrial Boulevard, Boucherville, Quebec, Canada, was issued a license by defendant Roberts to have its compressed gas cylinders chemically analyzed and tested outside the United States prior to sale within the United States.

^{1/} Joint Appendix at 1. [Pages in the Joint Appendix will hereinafter be designated by the page number, followed by a small "a". e.g. "7a."]

JURISDICTION AND VENUE

This court has jurisdiction over this action under 28 U.S.C. §§1331 and 1337. Venue lies properly in this court under 28 U.S.C. §1391(e)(1) because defendant Engineering Products of Canada, Ltd.'s agent for service of process resides in the Southern District of New York.

PROCEEDINGS BELOW

In this action ACMC seeks declaratory and injunctive relief: 1) declaring that the license issued to Engineering Products of Canada, Ltd. is void; 2) declaring that all similar licenses issued by DOT are void; and 3) enjoining DOT from issuing more such licenses except after public notice and the opportunity for public comment or a public hearing.

The complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction were filed in the United States District Court for the Southern District of New York on September 2, 1977. The motion for a temporary restraining order was denied by the Honorable Milton Pollack on the day it was filed. The hearing on the motion for a preliminary injunction was consolidated with the trial on the merits. Testimony from two ACMC witnesses was taken on September 30 and final argument was heard on October 10, 1977 at which time Judge Pollack denied all relief and dismissed the complaint. Judge Pollack also denied a motion to intervene as defendants filed by U.S. Cylinders, Inc. and U.S. High Pressure Cylinders, Inc., two companies which had applied for licenses similar to those issued to defendant Engineering Products of Canada, Ltd.

STATEMENT OF FACTS

A. Compressed Gas Cylinders Are Hazardous

Compressed gas cylinders are made of metal and hold gases of all sorts, including gases which may be flammable, explosive, or poisonous, often at extremely high pressures. The hazards of a defective compressed gas cylinder have been recognized by Congress since 1922, when comprehensive federal regulation of the transportation of compressed gases in interstate commerce began.

The destructive force of a filled cylinder has been likened to that of a small bomb. A 51" by 9" oxygen cylinder pressurized to 2200 psig (pounds per square inch, gauge pressure), which is in wide use in American industry, has the destructive force of 24 sticks of dynamite or .52 pounds of T.N.T. 24a

Minor and unsuspecting looking faults in a cylinder can be extremely dangerous and may lead to fatal accidents. For example, in January 1971, an experienced inspector had inspected a used cylinder and approved it for refilling. As this cylinder was being refilled, it ruptured and a worker standing near the cylinder was hit by the exploding cylinder and killed instantly. The rupture was caused by a scratch only .045 of an inch deep which ran the length of the cylinder. 24 a.

DOT has recognized that many foreign manufacturers cannot meet DOT cylinder standards:

. . . [f]oreign cylinder manufacturers constitute a diverse group which unquestionably includes a great many concerns that will never seek entry into the U.S. cylinder market, as well as concerns that will not or cannot comply with DOT regulatory standards. 41 Fed. Reg. 18413 (May 4, 1976); 8a

B. Compressed Gas Cylinder Manufacturing, Testing, and Inspection Are Regulated By DOT.

1. Statutory authority

From 1923 to 1967, the manufacture and transportation of compressed gas cylinders was regulated by the Interstate Commerce Commission. In 1967 this authority was transferred to DOT, which now regulates compressed gas cylinders under the Hazardous Materials Transportation Act of 1974 ("HMTA") which supercedes all prior statutory authority in this area. HMTA §114(b)(2), 49 U.S.C. §1801, note.

DOT is authorized by HMTA §1804(a) to issue regulations for the safe transportation in commerce of designated hazardous materials, which include compressed gas cylinders. HMTA §1803; 49 C.F.R. §178 et seq.

2. The cylinder specifications and HM-74

DOT's gas cylinder regulations require all cylinders which will be used in domestic commerce to be inspected, tested, and chemically analyzed in accordance with DOT's cylinder specifications (49 C.F.R. Part 178). Inspection generally must be performed during manufacture because it involves examination

of various components and surfaces of the cylinders. Inspection has previously been permitted to be performed outside the United States, at the manufacturing site. The HM-74 amendments now require all inspectors of foreign manufacturers ^{1/} to be licensed.

Since 1922, testing and chemical analysis has been required to be performed in the United States. The HM-74 amendments, under which the disputed licenses are issued, permit "approved" (licensed) manufacturers and inspectors to conduct testing and analysis outside the United States. ^{2/} Such tests involve measuring the cylinder's response to physical stress and testing the physical properties of the metals in completed cylinders. Chemical analysis is required to determine the composition of the metals in the cylinder.

C. American Cylinder Manufacturers and Users Have Heretofore Participated In All Phases of the Gas Cylinder Regulatory Process and Have Been the Primary Source of the Regulations Enforced By the Licenses at Issue.

The court below found that the American cylinder manufacturers have "heretofore participated as a friend of the governmental agency in all phases of its regulatory activity, including rule-making, licensing proceedings, industry suggestions on construction, specifications, safety matters, and others." 127-28a

^{1/} 49 C.F.R. §173.300 a; 41 Fed. Reg. 18414; 9a.

^{2/} 49 C.F.R. §173.300 a and b; 9a-10a.

The organization through which the cylinder industry transmits much information to DOT, including proposals for new or modified cylinder specifications, is the Compressed Gas Association ("CGA"). Its members manufacture, distribute and ship gases, and manufacture cylinders, valves, and other items related to the containment of these gases. 43 a. CGA was described by Robert F. Spangenberg who is "quite active with the various committees of the Compressed Gas Association," (42 a) as "not actually a trade association, it is primarily interested in safety in this industry as well as the technical aspect of it." 43 a.

Both Mr. Spangenberg and Ernest Steigerwalt, who testified for ACMC at the September 30 hearing, have been chairman of the cylinder specifications committee of the CGA. 42 a; 50 a. Both are officers of American cylinder manufacturing companies, and are responsible in their companies for compliance with DOT cylinder specifications. 42 a; 50 a. Mr. Spangenberg has a degree in engineering, (41a.) and Mr. Steigerwalt holds a B.A. in chemistry. 49 a.

The CGA cylinder specifications committee develops new or modified cylinder specifications for submission to DOT for rulemaking changes. 50a. Mr. Steigerwalt testified that "In most cases outside of the normal comment period, [the work of the CGA cylinder specifications committee] is, in most cases taken almost verbatim and put into the regulations." 50 a. Mr. Spangenberg

explained that "[t]he DOT specifications almost entirely consist of industry proposals and industry workup." 48a.

Since 1971 the cylinder specifications committee has been working on a proposal to "upgrade" DOT's cylinder specifications (69a-70a) to expand design and manufacturing criteria and eliminate ambiguities in the regulations. 69-70a.

Additional subjects of comment by the industry have been (to provide a few examples) pore size requirements (67a), Safety Relief device standards (67a), the need for a requirement for better safety devices on cylinders filled with hydrogen at 110% of rated pressure (68a), fire tests for acetylene cylinders (69a), and stress factors on certain aluminum cylinders. (73-4a) Many of the comments provide DOT with expert information based on industry's knowledge of the development of the standards. (47-8a) For example, DOT withdrew one modification proposal based on the comments of Mr. Spangenberg and the CGA. (47a).

D. The Licenses at Issue Are DOT's Method of Enforcing Its Cylinder Specification Regulations Against Foreign Manufacturers.

In 1971 DOT concluded that gas cylinder analyses and tests could be performed outside the United States "under appropriately controlled manufacturing procedures." 41 Fed. Reg. 18412 (May 4, 1976); 7a. The new regulations, 49 C.F.R. §173.300 a and b define those controls: a licensing program for foreign manufacturers and independent inspectors coupled with special

requirements for foreign manufacturers to ensure that they will comply with DOT's cylinder specifications.

The licensing program also is intended to ensure compliance by foreign manufacturers whose cylinders are tested and analysed in the United States. As Alan I. Roberts, Director of DOT's Office of Hazardous Materials Regulations, explained:

Through the approvals required by the HM-74 amendments, the Department's control over the manufacture of DOT specification cylinders is greatly augmented. Previously, only high pressure cylinder manufacturers used "disinterested" inspectors, who were approved by the Bureau of Explosives. Now independent inspectors are required for all foreign manufacturers, as well as domestic high pressure manufacturers, and those inspectors must be approved directly by this Department. A foreign manufacturer who conducts tests and analyses outside the United States, in addition to using an approved inspector, must himself be approved by the Department. Even if he avoids submitting himself to the Department's approval examination by conducting tests and analyses within the United States, he still cannot manufacture cylinders without using an independent inspection agency approved by the Department, which approval will involve an examination of his manufacturing site by the Department. Affidavit of Alan I. Roberts, ¶9; 30a.

The licensing regulations impose additional requirements on foreign cylinder manufacturers to ensure compliance: appointment of an agent for service of process in the United States to ensure exposure to civil or criminal action under the HMTA and to product liability suits (41 Fed. Reg. 18413-14; 8-9a);

unannounced access by DOT to the manufacturing/testing site (30a); and "other terms and conditions as [DOT] considers necessary" (49 C.F.R. §173.300 b(d)) which in the license at issue includes the use of special cylinder markings.

E. The Challenged Approval Procedures Require An Application and Presume That a DOT Inspection Will Occur, But Provide For No Public Notice or Comment, and Do Not Require DOT to Explain the Basis For its Action.

The licensing procedures are set forth at 49 C.F.R. §173.300 a and b.
9 a-10a.

The application process for inspection agencies begins by the submission of a written application to DOT. The applicant must state its name, address, principal business activity, telephone number, and description of each ownership interest greater than three percent. The applicant must "set forth a detailed description of the inspection and testing facilities to be used", describe its capability to perform the inspections and tests, name and describe the qualifications of the individual inspectors, designate an agent for service of process in the United States, and agree to allow DOT to inspect its premises.

The application for manufacturers is similar except that the manufacturer must describe its facilities and the specifications of the proposed cylinders, and identify the independent inspection agency to be used.

For both manufacturers and inspectors, the regulations state that DOT will grant or deny its approval "on the basis of the information submitted in the application and [its] own investigation." 49 C.F.R. §§173.300 a(b) and 173.300 b(d). The regulations do not explain what that investigation will consist of or how it will be performed. The regulations do not require DOT to give public notice of the receipt of an application, nor allow any public comment on it nor do they provide any way of knowing what DOT actually did.

In fact, in issuing the disputed license, DOT did not publish public notice of the application. DOT did not seek public comment. DOT did not hold a hearing. DOT based its decision on information outside the public record. DOT's public file on these applications was prepared belatedly in response to a Freedom of Information Act request by ACMC. 35a. Mr. Steigerwalt reviewed these files on September 9, 1977 and found that they did not contain enough information to permit him to judge whether the applicants could comply with DOT specifications because "it was not possible to determine how DOT interplayed with the information submitted by the various applicants." 51a. His review included files of applications which already had been granted. 52a. Even as to these files, Mr. Steigerwalt concluded: "Basically what I found was that there was no consistent way of telling how the government evaluated the manufacturers and the inspection agencies." 53a.

In short, DOT used a secret approval process, hidden from the public eye, immune from constructive comment by interested persons, and in the final analysis devoid of any procedures whatever.

F. There Are No Compelling Reasons Why DOT Should Not Provide Procedural Safeguards When It Issues These Licenses.

The regulations establishing DOT's licensing procedures were published in the Federal Register on May 4, 1976. (7-11a). In November of 1976, the foreign cylinder approval program was assigned for evaluation to the Compliance Branch of the Office of Hazardous Materials Operations. Plant inspections began in December, 1976, with the intention of attempting one plant inspection per month thereafter. 33a. As of September 9, 1977, nine foreign manufacturers and eight inspection agencies (three of which apparently are domestic) had applied for licenses; six manufacturers and seven inspection agencies had been inspected by DOT. 33-5a. Four approvals (licenses) have been issued. 35a.

Thus, DOT has not been overwhelmed with applications nor does the speed with which it has acted upon them indicate that it considers the applications urgent. The record does not suggest that DOT would be overburdened by complying with its statutory duty to give public notice of the applications, provide an opportunity for comment, and hold hearings if comments raise disputed issues of fact.

ARGUMENT

- I. THE HAZARDOUS MATERIALS TRANSPORTATION ACT DOES NOT AUTHORIZE DOT TO ISSUE LICENSES TO ENSURE COMPLIANCE WITH ITS CYLINDER SPECIFICATIONS WITHOUT PUBLIC NOTICE AND THE OPPORTUNITY TO COMMENT, AND THE OPPORTUNITY FOR A HEARING IF THE COMMENTS RAISE DISPUTED ISSUES OF FACT.

- A. DOT's Licensing Program Is The Method DOT Has Chosen To Enforce Its Gas Cylinder Specifications Against Foreign Manufacturers.

The rulemaking Docket HM-74, under which DOT promulgated the licensing regulations at issue, did two things. First, it made it much easier for foreign manufacturers to produce cylinders in compliance with DOT requirements by allowing them to perform tests and analyses outside the United States. Second, it provided a new procedure for enforcement of the existing DOT cylinder requirements to ensure compliance by foreign manufacturers who are less susceptible to control by DOT or vulnerable to such deterrants as product liability suits.

DOT's new enforcement program for foreign manufacturers has two parts. First, DOT picks-and-chooses from among all foreign manufacturers those which are sufficiently knowledgeable and capable of meeting DOT's cylinder specifications and responsible enough to be relied upon to do so even though they are less vulnerable to thorough supervision by DOT. Licenses are issued to those companies and to their inspectors. Second, DOT issues special orders to the licensed foreign manufacturers to help ensure that they

will comply with existing regulations: they must appoint an agent for service of process in the United States, they must agree to allow DOT unannounced access to the manufacturing/testing site, and they must agree to any other added "terms and conditions as [DOT] considers necessary." 49 C.F.R. §173.300b(d). For Engineering Products of Canada, Ltd., an added condition was that the company put special identifying markings on all cylinders shipped to the United States. 147a.

The licensing and compliance regulations do not change the cylinder specifications or process requirements with which the foreign manufacturer must comply.

B. DOT's Enforcement Powers Must Be Expressly Conferred By Statute.

It is hornbook law that the authority of an administrative agency (such as DOT) is circumscribed by its enabling statute. As the Supreme Court explained in Stark v. Wickard, 321 U.S. 288, 309 (1944):

"[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. (citations omitted)

Accordingly, the judicial review provisions of the Administrative Procedure Act require a reviewing court to set aside agency action "in excess of statutory jurisdiction. . . ." 5 U.S.C. §706(2)(C). This rule also applies to the failure to follow procedural requirements: the Administrative Procedure Act

requires a reviewing court to set aside agency action taken "without observance of procedure required by law."

C. The Bifurcated Regulatory Scheme of the Hazardous Materials Transportation Act Does Not Authorize DOT to Issue Licenses Without Observing Public Procedures Required By The Statute.

1. The HMTA bifurcates DOT's authority to regulate the transportation of hazardous materials into the power to issue regulations (§1804) and the power to enforce them (§§1808, 1809, and 1810).

The Hazardous Materials Transportation Act of 1974 ("HMTA"), 49 U.S.C. §§1801-1812, provides a comprehensive scheme for the regulation of hazardous materials transported in the United States. DOT's regulatory authority is bifurcated into 1) the power to issue regulations and 2) the power to enforce them. Section 1804(a) authorizes DOT to issue regulations for the safe transportation in commerce of hazardous materials. Section 1804(a) provides:

(a) The Secretary may issue, in accordance with the provisions of section 553 of Title 5 including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous

materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such persons for use in the transportation of certain hazardous materials.

Section 1804(a) empowers DOT to issue regulations and defines their permissible scope. Section 1804 requires that those regulations be of general applicability. They may be issued only in compliance with §553 of the Administrative Procedure Act (APA), including an opportunity for informal oral presentation. DOT complied with the procedural safeguards of §553 of the APA when it promulgated 49 C.F.R. §173.300 a and b. However, the procedures set out in 49 C.F.R. §173.300 a and b do not comply with these procedural safeguards. Thus, we are focusing on the second step of a two-step process related to procedures by which DOT approves foreign manufacturers of compressed gas cylinders and their independent inspection agencies.

Section 1806 empowers DOT to issue exemptions from the 1804(a) regulations to any person who "transports or causes to be transported or shipped hazardous materials in a manner so as to achieve a level of safety" consistent with the requirements of such regulations. Exemptions may be issued only under the following public procedures:

Each person applying for such an exemption or renewal shall, upon application, provide a safety analysis as prescribed by the Secretary to justify the grant of such exemption. A notice of an application for issuance or renewal of such exemption shall be published in the Federal Register. The Secretary shall afford access to any such safety analysis and an opportunity for public comment on any such application, except that nothing in this sentence

shall be deemed to require the release of any information described by subsection (a) of Title 5, or which is otherwise protected by law from disclosure to the public. (emphasis added)

Sections 1808, 1809, and 1810 of the HMTA empower DOT to enforce the §1804(a) regulations by various means. Section 1808(a) provides:

(a) The Secretary is authorized, to the extent necessary to carry out his responsibilities under this chapter, to conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, take depositions, and conduct, directly or indirectly, research, development, demonstrations, and training activities. The Secretary is further authorized, after notice and an opportunity for a hearing, to issue orders directing compliance with this chapter or regulations issued under this chapter; the district courts of the United States shall have jurisdiction, upon petition by the Attorney General, to enforce such orders by appropriate means. (emphasis added)

The first sentence of §1808(a) gives a general authorization to the Secretary to undertake several different types of activities (including holding hearings) in order "to carry out his responsibilities." Such an authorization is necessary because a federal agency can do only what Congress empowers it to do. The second sentence of §1808(a), which empowers the Secretary "to issue orders," makes clear that the Secretary must give notice and provide an opportunity for a hearing before he issues an order "directing compliance with this chapter or regulations issued under this chapter."

Section 1809(a) authorizes DOT to assess civil penalties for a knowing violation of the HMTA or regulations issued thereunder "after notice and an opportunity for a hearing." Section 1809(b) makes a violation of the HMTA or a regulation issued thereunder a criminal offense.

Section 1810 authorizes the government to sue in United States district court to enjoin or seek punitive damages for a violation of the HMTA, or an order or regulation issued thereunder.

2. Neither the "Regulation" sections nor the "enforcement" sections authorize DOT to issue licenses or orders except on the basis of public procedures.

The licenses and special orders to ensure compliance by foreign manufacturers at issue here have been issued without public notice, without the opportunity for public comment, and without the opportunity for a hearing if comments raise disputed issues of fact.

None of the sections of the HMTA cited above authorize DOT to act without some sort of public procedures, and DOT has cited no alternative source of authority for its action. Section 1804 authorizes DOT to issue regulations "in accordance with the provisions of section 553 of Title 5 including an opportunity for an informal oral presentation." Section 1806 authorizes DOT to issue exemptions after providing notice and an opportunity for public comment. Section 1808(a) authorizes DOT to issue orders directing compliance with the HMTA or orders issued thereunder "after notice and an opportunity for a hearing." Section 1809(a) authorizes DOT to impose civil penalties "after notice and an opportunity for a hearing."

DOT's licenses and orders which were issued without any of the foregoing procedures, are not authorized by any of the foregoing statutes. In fact, the court below did not hold that DOT's action is authorized by any particular section

of the HMTA, but only that §1808(a) (orders) did not apply.

3. If proper procedures were followed, §1808(a)(orders) would authorize DOT's action, but §1804(a) would not.

As explained above, an agency may do only what it is empowered by statute to do. We know of no court which has ever held that an agency may issue regulations which expand its authority beyond statutory limits. Therefore, DOT cannot circumvent the procedural safeguards mandated in 49 U.S.C. §1808(a) by failing to include such safeguards in 49 C.F.R. §173.300 a and b. We have also explained that none of the relevant sections of the HMTA under which DOT can act empower it to issue licenses or orders without any public procedures whatever, as DOT has done here. However, the question arises as to whether any section of the HMTA would authorize DOT's action if the proper procedures were followed. We believe that §1808(a) (orders) would, but §1804(a) (regulations) would not.

- a. Section 1804 could not authorize these licenses and orders for compliance.

First, §1804(a) could not authorize DOT to issue these licenses or orders to ensure compliance. Section 1804(a) authorizes DOT to issue only "regulations" which "shall be applicable to any person." In contrast, the licenses and orders at issue are not "regulations" and they apply only to those who receive them. Second, these licenses and orders are not themselves safety regulations, but a means of enforcing those regulations with respect to specific foreign manufacturers. Other sections of the HMTA contain DOT's authority to enforce its safety regulations with respect to specific persons or companies.

b. Section 1808(a) could authorize these licenses and orders.

The court below held that §1808(a) does not apply to these licenses and orders because no violation has occurred. 136-37a. But section 1808(a) applies to "orders directing compliance with this chapter or regulations issued under this chapter. . . "; its language is not limited to instances in which violations have occurred. The court below apparently relied heavily upon the purported "interpretation" of §1808(a) by DOT in regulations issued on September 9, 1976, 41 Fed. Reg. 38167, 38169 (September 9, 1976). However, in that notice DOT does not say that compliance orders of the type envisioned therein are the only way to implement its powers under §1808(a), but only that §1808(a) does authorize such orders. There is no reason to infer that DOT even considered the full scope of its authority under §1808(a).

Moreover, a comparison of comparable enabling provisions for other agencies reveals that when Congress wished to limit an agency's enforcement order authority to the context of past violations, it so stated. For example, the Federal Trade Commission is empowered to issue an order "to cease and desist from using such method of competition or such act or practice."

15 U.S.C. §45(b). The Interstate Commerce Commission is directed to "by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." 49 U.S.C. §5(7).

In contrast, other agencies are broadly authorized to issue orders enforcing compliance whether or not a violation has occurred. For example, under the Utility Holding Act of 1935 the Securities and Exchange Commission is empowered "to require by order, after notice and an opportunity for a hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company. . . does not unduly complicate the structure. . . of such holding company system." 15 U.S.C. §79K(b)(2). Similarly, as to licensed companies the Federal Power Commission is empowered to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary and appropriate to carry out the provisions of this chapter." 16 U.S.C. §825(h).

Four observations are appropriate here. First, §1808(a) is not expressly limited to correcting past violations as are the first group of statutes cited above. Second, agency enforcement statutes are not uniformly limited to past violations. Third, both groups of enforcement-order statutes are usually broadly construed by the courts. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (§10(c) of the National Labor Relations Act); Gilbertville Trucking Co., Inc. v. United States, 371 U.S. 115, 129 (1962) (power of the Interstate Commerce Commission to order divestiture under §5(4) of the Interstate Commerce Act, 49 U.S.C. §5(4)). Fourth, it is evident that when Congress wishes to authorize an agency to issue orders it does so expressly as it did in §1808(a), unlike §1804(a).

Licenses are "orders" as defined in the Administrative Procedure Act, 5 U.S.C. §551(6) and there is no evidence in the HMTA to suggest that they are not "orders" within the meaning of that statute as well. These licenses are issued to enable DOT better to enforce compliance with its cylinder specifications by foreign manufacturers. The special orders to ensure compliance associated with those licenses are intended to perform the same function. These orders are not issued in response to past violations. They are, however, issued to manufacturers who have never complied with DOT's requirements. This dissimilarity is not so striking as to remove these orders from the ambit of a statute which is not limited to instances of past violations in any event.

D. The Use of Public Procedures Would Not Be Burdensome But Would Be Useful.

As explained above, as of September 9, 1977, almost a year and one-half after DOT's licensing regulations were issued, only sixteen companies (seven foreign manufacturers) have applied. Of course hearings would be required only if comments on the applications raised disputed issues of fact.

Sections 554, 556, and 557 of the Administrative Procedure Act are specifically written to reduce the administrative burden of licensing proceedings.

Section 556 specifically reduces the administrative burden of licensing proceedings by permitting the submission of evidence in written form. 5 U.S.C. §556(d). Section 557 eliminates the requirement for a tentative or recommended decision on applications for initial licenses. 5 U.S.C. §557(b). Finally,

§554 further reduces the administrative burden by exempting licensing proceedings from the requirement that the decision-maker may not engage in ex parte contacts with the parties. Thus, DOT's investigations of license applicants may be conducted by an employee who will contribute to the decision to grant or deny the license.

DOT's decision to grant a license to inspect or manufacture compressed gas cylinders calls for a detailed factual inquiry into the manufacturer's fitness, reliability and responsibility and the inspector's knowledge and interpretation of imprecise safety standards. In this situation, an interested or adversely affected party may bring important evidence to DOT's attention.

Participation by interested parties would be especially valuable here because it would help to ensure that applicant inspectors, as well as manufacturers, understand many important but ambiguous portions of defendants' standards. Uniform interpretation will promote safety and make sure that ACMC members and foreign manufacturers will be competing on an equal footing. Unfortunately, defendants' specifications are laden with ambiguous terms. For example, the specifications for 3A cylinders provide that they are to be made "by best appliance and methods; dirt and scale to be removed as necessary to afford proper inspection; no fissure or other

defect acceptable that is likely to weaken the finished cylinder appreciably; reasonably smooth and uniform surface finish required." See e.g., 49 C.F.R. §178.36-8. As pointed out by many individuals who commented on DOT's standards, ^{1/} years of cooperation between manufacturers, inspectors and users in the United States has served to clarify the interpretation given ambiguous portions of the specifications and to enhance the safety of the cylinders produced today as compared to those produced twenty years ago even though the same basic codified standards are still in force.

Even the best foreign manufacturers and inspectors frequently do not interpret defendants' standards correctly.

"Over the past fifteen years, the United States has cooperated in an effort to establish cylinder standards for all countries through The International Standards Organization [ISO]. There are several features in DOT regulations which have been consistently rejected or omitted by foreign manufacturers: The concept of maximum design stress limitation; leakage tests on spun-type cylinders; definition of quench and temper heating treatment and a precise definition of approved material. In addition to the above, most foreign countries do not understand or accept the volumetric expansion test which United States manufacturers consider the most important safety feature." (ACMC statement of November 1, 1971)

^{1/} Comments to this effect were submitted to DOT by Robert A. Hirst, President, Pressed Steel Tank Co. (2/3/71); W.A. Pearson, President, Harrisburg Steel Co. (3/18/71) and (9/23/71); Lane Hoffman, Executive V.P., The Marison Co. (3/23/71); Frank Walton, Secretary of the Business and Transportation Agency, State of California (9/29/71); D. B. Maag, Jr., Division V.P., Norris Industries (10/29/71); William W. Scott, ACMC (11/1/71); Compressed Gas Association Inc. (4/23/71).

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Robert Spangenberg and T.F. Vassallo tested foreign cylinders claimed to have been manufactured to DOT standards. Both witnesses presented evidence that the cylinders they tested failed to comply with one or more DOT standards. As Mr. Vassallo concluded: "These results cast considerable doubt as to whether. . . foreign manufacturers can or are willing to interpret and abide by the (DOT) specifications. . . ."

It is clear that (1) many DOT specifications are ambiguous or vague, (2) potential applicants have not demonstrated an understanding of DOT specifications and (3) at least some potential applicants who thought they understood DOT specifications in fact do not. Consequently, third parties can serve a valuable function in the licensing process by commenting on the applicant's ability to understand and comply with DOT specifications. Interested parties such as ACMC's members also would have the expertise, the interest, and the resources to augment DOT's review of an applicant's past manufacturing or inspection techniques, standards, performance and/or integrity. Where the public safety is at stake, such assistance should be welcomed.

1/ Mr. Vassallo is the President of Arrowhead Industrial Services, Inc. His report was submitted as part of the Compressed Gas Association's comments of April 23, 1971.

II. ACMC HAS STANDING TO BRING THIS ACTION

A. ACMC Is Being Denied Its Right To Participate In Addition To Its Economic Injury.

The government's standing argument is predicated upon a mischaracterization of ACMC's case. The government incorrectly alleges that ACMC's sole interest is that its members "will suffer a loss of sales and profits if foreign-made cylinders are permitted to enter the American Market." ^{1/} That is not so. ACMC also relies upon the right to participate conferred by 49 U.S.C. §1808(a) of the Hazardous Materials Act and upon the right of participation conferred by 5 U.S.C. §558(c) of the Administrative Procedure Act. ACMC's interest, therefore, also concerns the denial of its rights to participate in agency proceedings.

The work which ACMC's members perform for the Compressed Gas Association in helping to formulate cylinder specifications demonstrates their more generalized interest in the safety of the cylinder industry. In addition, were unsafe cylinders permitted to enter the United States, the price of product liability insurance would rise tremendously since the safety record of all cylinders could be impaired by foreign cylinders which do not meet DOT specifications. Introduction of defective cylinders could also result in even stricter regulation of the industry in the future. All of these factors substantiate the fact that ACMC's interest extends far beyond trying to prevent increased competition.

^{1/} Defendant's Memorandum at 11.

1. The hearing requirements are for the benefit of the public.

The denial of the right to participate under §1808(a) is a right which belongs to the general public which has an interest in the safety of the cylinders transported in the United States. Because it is the public safety which is to be protected, the public should have the opportunity to participate in the hearings held for its benefit.^{1/} Moreover, users of cylinders are a part of the general public who are vitally interested in the safety of the manufacturing process. The Compressed Gas Association (CGA) in which ACMC's members perform an important technical role, is composed of users of cylinders who are being denied their right to participate in the licensing process.

2. ACMC's members have participated actively before DOT.

The court below found that the industry has in fact participated actively before the Department of Transportation in all phases of the regulatory activity. The industry itself has been the Department's source for most specifications in the cylinder industry, and the industry has been welcomed by DOT at every phase of the regulatory process except for this particular kind of licensing. This continuous relationship between ACMC and DOT cannot be ignored. If ACMC, which has expressed interest on matters of vital concern to the industry and which has provided the Government with

^{1/} That the hearing requirements are intended to benefit the public is apparent in 49U.S.C. §1806(a). Notice and an opportunity for public comment are afforded when a person applies for an exemption or renewal of an exemption pursuant to this section. A notice of an application for issuance or renewal of such exemption is published in the Federal Register, and the Secretary must afford access to the safety analyses provided by the applicant and an opportunity for public comment on any such application.

useful and technical information throughout the regulatory process, is denied standing when it turns from the agency to the courts for relief, then the primary spokesman for the industry will be cut off at the courthouse door.

"The underlying reality is that trade associations and other group representatives of interests are accepted, sometimes welcomed, by executive officials and agencies as a means of presenting and organizing in manageable form the inquires and objections that Government must consider. Modifying Justice Holmes' phrase, whether or not this begins as a duty, it is a necessity, and gives rise to relationships that cannot be ignored by the courts. Interest groups are, in today's complex society, an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect. The channel runs both ways." National Automatic Laundry Cleaning Council v. Shultz, 443 F.2d 689, 693 (1971).

B. Competitors Have Standing

The District Court stated that ACMC did not have standing to bring this action because competitors may not protest increased competition. This is a plain misstatement of the law. ACMC's members produce approximately 90 percent of the compressed gas cylinders made in the United States, (23a) and the Government does not deny that ACMC's members may suffer economic injury-in-fact from DOT's action. Defendant's Memorandum at 11 and 14 (footnote). Economic injury in and of itself may satisfy the requirements of standing. A competitor who is "likely to be financially" injured may be a

reliable private attorney general to litigate issues of the public interest.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

Although Defendants seek to distinguish Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1972) ("and its progeny" including Union Carbide v. Train, 73 F.R.D. 620 (S.D.N.Y. 1977) from the facts in this case, they have failed to do so. The disappointed bidder in Scanwell had no right to have the contract awarded to him in the event that the district court found illegality in the contract award. Instead, the thrust of his claim on the merits was to satisfy the public interest in having agencies follow the regulations which control government contracting.

"The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private 'attorney general.'" Scanwell, supra at 864.

Here, ACMC would gain the right to participate in the DOT licensing procedures, a right mandated by statute. This injury is separate from the conceded economic injury which ACMC alleges, and each alone is sufficient to confer standing. The Scanwell opinion makes clear that ACMC may sue not only because its members compete but also as a "private attorney general" to vindicate the public interest in the safety of the industry.

In many cases which follow the theory of Scanwell, standing has been found where the plaintiff was a competitor of a party who would benefit from agency action, and was a "third party" in the sense that the regulation or action in question did not act directly on him; i.e., the effect on the plaintiff was through the advantage gained by a competitor. Standing was granted to plaintiffs in Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970) on the basis of "loss of substantial business" where national banks began to provide travel services for their customers and competed with travel agents. Similarly, in Investment Company Institute v. Camp, 401 U.S. 617, 620 (1971), investment companies and securities dealers had standing to question whether national banks could legally enter the field in competition with them by operating competitive investment funds.

It is highly significant that the cases which the Government cited in its brief in the lower court in support of the proposition that one who merely suffers an increase in lawful competition does not have standing are, in reality, cases where the plaintiff failed to state a claim for relief. In Alabama Power Company v. Ickes, 302 U.S. 464, 475 (1938), the court dismissed the bills on the ground that no legal or equitable right of the power company had been invaded. Although the court labeled this deficiency a lack of standing, the language of the court indicates that plaintiffs had no cause of action. Similarly, in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 927 (2d Cir. 1968), the court states that one "cannot

as a general matter object to governmental action on the basis that it aids one's competitors, for no legal wrong results from lawful competition." Absence of a "legal wrong" indicated that plaintiffs stated no claim for relief, not that they lacked standing.

The government has taken the statement that "freedom from competition is not constitutionally protected" out of context. Law Motor Freight v. Civil Aeronautics Board, 364 F.2d 139, 144 (1st Cir. 1966). That case involved a Civil Aeronautics Board (CAB) order granting authority to an air freight company to file tariffs and perform pick-ups for air freight traffic between Boston and Nashua, New Hampshire. While the petitioner faced an increase in competition as a result of the Board's decision, the constitutional issue involved whether "such vital rights to life, liberty or property were involved as to invoke the constitutional due process mandate for a hearing." The gravamen of the court's holding was that the petitioner had no claim for relief because its due process rights were not violated by the CAB's action. Here ACMC is invoking statutory rights, not constitutional rights.

We need not distinguish the Perkins case cited in the Defendants' Memorandum because it is no longer good law. Union Carbide v. Train, supra, at 622.

The alleged harm to the various petitioners in the cases cited by the government derived from an increase in lawful competition. If ACMC is correct that the licenses which DOT has granted pursuant to 49 C.F.R. §173.300 a and 49 C.F.R. §173.300 b are invalid, then its members may be harmed economically from unlawful competition. ACMC has standing to protest unlawful competition.

C. ACMC Meets The Supreme Court's Two-Pronged Test For Standing.

The Supreme Court has stated a two-pronged test for standing: "injury in fact" and "whether the interest sought to be protected by the complaint ^{1/} is within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

As has been discussed, the Government does not deny that ACMC's members may suffer injury-in-fact from this action. Defendants' Memorandum at 11 and 14 (footnote). Furthermore, the right to participate in the licensing process, which ACMC invokes here, is exactly the interest protected by the statutes ACMC is invoking.

1. ACMC alleges harm to its members

Judge Pollack's opinion that ACMC lacked standing was based on the holding in Sierra Club v. Morton, 405 U.S. 727 (1972). His conclusion is based on a misconception of the case.

^{1/} It must be recognized that the "zone" test has come under increasing attack. Davis, Administrative Law in the Seventies, §22.02 (1976 Ed.)

Sierra Club v. Morton held that a person has standing to seek judicial review under the Administrative Procedure Act only if he can show he himself suffered or will suffer injury, whether economic or otherwise. The Sierra Club alleged only the public interest that the aesthetics and ecology of the area would change. The Sierra Club, however, failed to allege that this change would harm itself or any of its members so it lacked standing to maintain the action. Id. at 735. Here, unlike the Sierra Club, ACMC is alleging injury to its members. More recently, the opinion in Aberdeen and Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 699 (1973), made clear that standing is not confined to those who show economic harm as "aesthetic and environmental well-being, like economic well-being are important ingredients of the quality of life in our society." Sierra Club, supra at 735. Citing Sierra Club, the court granted standing where the appellees had claimed that specific and allegedly illegal action of the Interstate Commerce Commission would directly harm them in their use of natural resources in the geographic area. SCRAP, supra, at 686, 88. ACMC alleges that its members compete in the American cylinder industry and may suffer economic injury as well as injury resulting from their being denied their right to participate in the licensing process. Therefore, even under the Sierra Club test as applied in SCRAP, ACMC has standing to bring this action.

2. ACMC's interest is within the zone of interest to be protected by the statute.

ACMC also satisfies the zone test. The zone test, however may be no longer applicable. First, the only case which analyses the APA which governs standing concluded that "it is clearly the intent" of Congress in the APA that "a party who is in fact aggrieved" has standing. Scanwell Laboratories v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970). The Scanwell holding is the current standard in the standing area. Second, the Supreme Court since 1970 has not followed the "zone" test. See, e.g. Eisenstadt v. Baird, 405 U.S. 438 (1972). Third, courts of appeals since 1970 have rarely denied standing on the basis of the "zone" test when injury-in-fact had been found. See, e.g. Colligan v. Activities Club of New York, 422 F.2d 686 (2d Cir. 1971). Finally, all federal courts have generally found ways to escape from applying it. Davis, Administrative Law in the Seventies, supra.

Furthermore, where statutes are concerned, as here, the trend is toward enlargement of the class of people who may protest administrative action. "The whole drive for enlarging the category of aggrieved persons is symptomatic of that trend." Association of Data Processing Service Organizations, Inc. v. Camp, supra, at 154. No explicit statutory provision is necessary to confer standing where the party bringing the suit is within the class of persons that

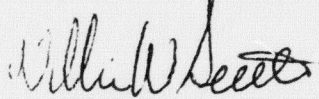
the statutory provision is designed to protect. Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968); Rasmussen v. United States, 421 F.2d 776, 778-9 (8th Cir. 1970). See also, Norwalk CORE v. Norwalk Redevelopment Agency, supra at 927 n. 9 and Association of Data Processing Service Organizations, supra at 153.

ACMC alleges that it is being injured economically as a competitor. It also alleges that it is being denied its right to participate in the licensing process, an injury which the above-cited statutory provisions are intended to prevent. There appears to be no valid reason grounded either in logic or in law why the "channel of communication" between DOT and ACMC, as a representative of the members of the American cylinder industry, should be cut off at this juncture. ACMC has standing to bring this action.

III. CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE,

Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS,
as Secretary of Transportation, JOHN J. FEARNSIDES,
as Acting Director, Materials Transportation Bureau,
ALAN I. ROBERTS, as Acting Director, Office of
Hazardous Materials Operations, and ENGINEERING
PRODUCTS OF CANADA, LTD.,

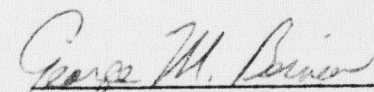
Defendants-Appellees.

BRIEF FOR APPELLANT

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